No. 96-341

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

DUNCAN AIRCRAFT SALES OF FLORIDA, INC.,

Petitioner,

vs.

PHILLIP R. and EDNA CAPPELLO, Individually, and PHILLIP R. CAPPELLO, as Adminstrator of the Estate of KIRK P. CAPPELLO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Duncan Aircraft Sales of Florida, Inc. states on page i of its petition that the question presented is:

> Whether the federal aviation regulations which give pilots responsibility for safety of aircraft alleviate any concurrent responsibility of air traffic controllers to assist pilots operating under visual flight rules with terrain avoidance.

That question is a misstatement. That question was not an issue in the appeal in the Court of Appeals and would not be an issue before the Supreme Court if certiorari is granted. The judgment of the Court of Appeals sought to be reviewed did not hold that the federal aviation regulations which give pilots responsibility for safety of aircraft alleviate any concurrent responsibility of air traffic controllers to assist pilots operating under visual flight rules with terrain avoidance. The Court of Appeals expressly found that "no factual basis exists for a finding of negligence on the part of Hughes," the air traffic controller. (Opinion, Petitioner's Appendix, p. 21).

If certiorari is granted, the questions that would properly be before the Court are as follows:

(1) Whether under Tennessee law the district court erred in submitting to the jury the issue of comparative fault on the part of air traffic controller Hughes when comparative fault was not pled as a defense by Petitioner and prior to the time comparative fault was adopted as a new defense under Tennessee law, the statute of limitations had barred any claim Respondents had against Hughes.

(2) Whether the factual findings of the Court of Appeals that air traffic controller Hughes did not see that the plane was about to fly into a mountain and did not know it was in danger and that no factual basis exists for a finding of negligence on the part of Hughes were erroneous.

(3) Whether the Court of Appeals misapplied the rule of law that, in the absence of evidence to the contrary, air traffic controllers may assume that a pilot flying VFR has complied with applicable FAA regulations.

LIST OF PARTIES

On page ii of its petition, Petitioner states that it has no parent companies or subsidiaries "within the meaning of Supreme Court Rule 29.1." That reference should have been to Supreme Court Rule 29.6, not 29.1.

The caption of the case in this Court contains the names of all parties.

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RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Phillip R. Cappello and Edna Cappello request that the Court deny the petition of Petitioner Duncan Aircraft Sales of Florida, Inc. for writ of certiorari seeking review of the judgment of March 27, 1996 by the United States Court of Appeals for the Sixth Circuit. The opinion of the Court of Appeals is reported at 79 F.3d 1465. The judgment of the United States District Court for the Middle District of Tennessee is dated February 15, 1994. (Judgment, Petitioner's Appendix, pp. 29-32).

STATEMENT OF JURISDICTION

Respondents originally filed this case in a Tennessee state court seeking damages for the wrongful death of their son. The case was removed to the United States District Court because that court had jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332. On June 3, 1996, the Court of Appeals denied the Petitioner's petition for rehearing the judgment of March 27, 1996. The Supreme Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

Airmen's Information Manual Rule 325. Note: "Terrain/obstruction clearance is not provided by ATC until the controller begins to provide navigational guidance, i.e. Radar Vectors."

Airmen's Information Manual Rule 407(b) December 13, 1990. A controller "[i]ssues a safety alert to an aircraft under his control if he is aware the aircraft is at an altitude

believed to place the aircraft in unsafe proximity to terrain, obstructions, or other aircraft."

Airmen's Information Manual Rule 325(b)(5)(a). "When climbing in visual conditions it is the pilot's responsibility to see and avoid obstacles.

T.C.A. § 28-3-104. Personal tort actions. — "(a) The following actions shall be commenced within one (1) year after the cause of action accrued:

(1) Actions . . . for injuries to the person . . ."

Tenn. R. Civ. Proc. 8.03 Affirmative Defenses: "In pleading to a preceding pleading, a party shall set forth affirmatively facts in short and plain terms relied upon to constitute . . . comparative fault (including the identity or description of any other alleged tortfeasors).

Fed. R. Civ. Proc. 8(c) Affirmative Defenses. "In pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense."

ABBREVIATIONS

The following abbreviations are used in this response:

AIM	Airmen's Information Manual
C.F.R.	Code of Federal Regulations
Dkt.	Docket Entry
Ex.	Exhibit

FAA	Federal Aviation Administration
FAR	Federal Aviation Regulation
IFR	Instrument Flight Rules
Joint App.	Joint Appendix in Court of Appeals
TCA	Terminal Control Area
VFR	Visual Flight Rules

The pages in the seven volumes of the transcript of proceedings are preceded by the number of the volume, I through VII, containing the pages referred to.

References to pleadings, motions and orders are to docket entry numbers.

STATEMENT OF THE CASE

Respondents sued Petitioner for damages for the wrongful death of Respondents' son, Kirk P. Cappello, arising from the crash of an airplane owned by Petitioner and operated by its employee, Donald T. Holmes, the pilot. Respondents' case was originally filed in the Circuit Court of Davidson County, Tennessee, on January 22, 1992. On March 3, 1992, the case was removed from the state court to the United States District Court for the Middle District of Tennessee.

Respondents' son, Kirk P. Cappello, was killed on March 16, 1991 at 1:42:19 a.m. when Petitioner's airplane piloted by its pilot crashed into a mountain 3,566 feet high 2 minutes after it took off flying under visual flight rules ("VFR"). Respondents' son and the nine other occupants of the plane

were killed. (I 98-99, 109; II 207-211). Respondents' son was 28 years of age and the band leader for Reba McEntire's band.

The pilot Holmes contacted air traffic controller Hughes for the first time at 1:41:34 a.m. At 1:41:45, Holmes informed Hughes that he was "standing by for ifr to amarillo." At 1:41:52, Hughes told Holmes his clearance had clocked out and that he would "be right back" with him. At 1:42:16, Hughes asked Holmes to identify himself. At 1:42:19, when Holmes was identifying himself, the plane crashed.

The crash occurred 34 seconds after Holmes first asked Hughes for IFR clearance. Positive control and clearance for instrument flight does not begin until the controller announces radar contact. Petitioner admitted that the plane was not under the control of Hughes at the time of the crash. The location and altitude of the plane did not appear on Hughes' radar screen. Hughes did not see that the plane was about to fly into the mountain and he did not know that the plane was in danger and he had no reason to assume that it was. All those facts were established by undisputed evidence. The Court of Appeals held: "Taking the evidence in the light most favorable to defendant, and giving defendant the benefit of every reasonable inference, no factual basis exists for a finding of negligence on the part of Hughes . . . ." (Opinion, Petitioner's Appendix, p. 21).

On page 6 of its petition, Petitioner states that "the record does not support, all facts as stated" in the opinion of the Court of Appeals. That statement is incorrect. All the facts stated in the opinion of the Court of Appeals were proved by undisputed evidence. Petitioner does not point out any fact stated in the opinion of the Court of Appeals that is not supported by the record and does not cite evidence in the record that contradicts any fact stated in the opinion of the Court of Appeals.

Respondents' complaint and all amendments thereto allege that the wrongful death of their son was the direct and proximate result of the negligence of Petitioner's pilot Holmes in flying the plane into the mountain. (Dkt. nos. 5, 53). The only answer Petitioner filed did not plead comparative fault of controller Hughes or of any non-party as a defense (Dkt. no. 21) and the final pretrial order did not plead or mention the defense of comparative fault. (Dkt. no. 93).

The case was tried before a jury during the period from January 18, 1994 through February 11, 1994. The district court denied Respondents' motion pursuant to Fed. R. Civ. Proc. 50(a) for judgment as a matter of law that Petitioner's pilot Holmes was 100% negligent and that his negligence was the proximate cause of Kirk Cappello's death and, over Respondents' objection, submitted the issue of comparative fault of Hughes and flight service specialist Kessock to the jury. The jury returned a verdict that Petitioner was 45% negligent, Hughes 27.5% negligent and Kessock 27.5% negligent. The jury found that the total compensatory damages were $732,829. Respondents were awarded judgment of $329,773.05, which was 45% of the total damages. (Dkt. nos. 187-188).

On appeal by the Respondents, the Court of Appeals reversed the finding that Petitioner was only 45% negligent and held that there was no factual basis for a finding of negligence on the part of FAA controller Hughes or flight specialist Kessock and stated:

> The court below erred in permitting a comparative negligence defense. The legal fault here is solely the defendant's, under the doctrine of respondeat superior. The portion of the jury verdict finding the FAA employees at fault must be set aside.

(Opinion, Petitioner's Appendix, pp. 21-22). Petitioner has not raised a question as to the ruling by the Court of Appeals setting aside the verdict that Kessock was at fault.

The Court of Appeals further stated in footnote 17 that Respondents' contention that the verdicts as to Kessock and Hughes must be set aside because Petitioner was not entitled to raise the defense of comparative fault of other tortfeasors who were non-parties need not be decided because the verdicts as to Kessock and Hughes were set aside for other reasons. (Opinion, Petitioner's Appendix, p. 22).

The Court of Appeals set aside the jury's award of total damages of $732,829 because it was not justified by the evidence. (Opinion, Petitioner's Appendix, pp. 26-27). Petitioner has not raised a question as to the ruling by the Court of Appeals setting aside the verdict as to the amount of damages.

The Court of Appeals ordered the judgment of the district court vacated and the case remanded to the district court with instructions that the liability of Petitioner has been established and that the damages issue must be retried. (Opinion, Petitioner's Appendix, p. 28). Petitioner's petition for rehearing and en banc suggestion was denied by order of the Court of Appeals of June 3, 1996 which stated: "... no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel" and the issues raised in the petition were fully considered upon the original submission and decision of the case." (Order, Petitioner's Appendix, pp. 33-34).

The statement on pages 6 and 7 of the petition that Hughes refused to issue immediate IFR clearance to Holmes and chose

instead to reenter the flight plan into the computer is not accurate. Hughes was required by FAA order 7220.2AS30-78 to reenter the flight plan which had been cancelled because Holmes did not take off within an hour and a half after his stated time for takeoff. (Opinion, Petitioner's Appendix, p. 19).

The statement on page 7 of the petition that Hughes did not check the screen to verify the aircraft's position, direction and altitude is misleading. It was established by undisputed evidence that the aircraft's altitude never appeared on Hughes' radar screen. (III 715-716).

The statement on page 8 of the petition that the Court of Appeals said that apportionment of responsibility to Hughes was error because a pilot flying VFR is not under the control of air traffic controllers and has sole responsibility to maintain eye contact with the ground and avoid obstructions is misleading. The Court of Appeals stated that Petitioner's pilot Holmes had chosen to take off at night under visual flight rules and then stated:

> He was therefore not under the direction or control of an FAA controller, and consequently, he had received no radio instructions or clearances before the crash. Under these circumstances of VFR flight, as explained in more detail below, the pilot in command had the sole responsibility to maintain eye contact with the ground and to avoid obstructions.

Citing 14 C.F.R. § 91.3; 14 C.F.R. § 91.13; Airman's Information Manual Rule 407(a) and Rule 325(b)(5)(a). (Opinion, Petitioner's Appendix, p. 2). In that portion of its opinion, the court did not mention apportionment of

responsibility to Hughes or say that it was error to apportion responsibility to Hughes because the pilot had the sole responsibility to maintain eye contact with the ground and avoid obstructions. Later in its opinion, the Court stated that the apportionment of liability to Hughes was error because it was established by undisputed evidence and admissions by Petitioner that during the 45 seconds between the time Holmes contacted Hughes and the crash, Hughes did not see that the plane was about to fly into a mountain, the plane was not under the control of Hughes and Hughes did not know the plane was in danger and had no reason to assume that it was and, therefore, "no factual basis exists for a finding of negligence on the part of Hughes. . . ." (Opinion, Petitioner's Appendix, pp. 18-21).

The statements on page 8 of the petition that the court acknowledged that if Hughes had not turned around to retype the flight plan he would have had time to notice that the aircraft was flying toward mountains at an unsafe altitude and that the aircraft was clearly visible on Hughes' radar screen are incorrect. The undisputed testimony of Petitioner's witness Hughes was that he could not see the plane's altitude on the radar screen because, after giving a squawk, the antenna has to "see that aircraft three times before it will acquire" and "that never happened" and he never had an opportunity to observe that altitude. (III 715-716).

The statement on page 8 of the petition that the court decided that Hughes' duty to retype Holmes' flight plan outweighed any duties that FAA regulations might otherwise impose on him to watch his radar screen is not correct. The court's opinion does not contain any such decision.

REASONS FOR DENYING THE WRIT

The argument beginning on page 9 of the petition cites numerous publications that are not in the record in this case. The facts which Petitioner claims are established by those publications which are outside the record cannot be considered as supporting Petitioner's contentions. Since Petitioner's contentions are based on those facts which are not established in the record in this case, Petitioner's contentions must fail.

Despite Petitioner's incorrect assertions to the contrary, the Court of Appeals did not decide that an air traffic controller could perform a low priority administrative task rather than assume control of an aircraft; the controller did not have ready access to any information of imminent danger to the aircraft; and the court did not decide that air traffic controllers do not have any concurrent duty to assist pilots in terrain avoidance. Petitioner does not point out any statement in the opinion indicating that the court made those decisions.

Petitioner's pilot Holmes had caused his flight plan to clock out in the FAA computer because he failed to take off within an hour and a half of the departure time stated in his flight plan. (Ex. 87; V 1040-1041). Holmes did not ask Hughes for IFR clearance until 34 seconds before the crash. Holmes never told Hughes of the location of his aircraft, the direction it was flying or its altitude or location and never asked Hughes for information about terrain. He never told Hughes that he was not looking in the direction he was flying the plane or that he did not know of the height and location of the mountain in the vicinity of the plane. At 1:42:16 a.m., Hughes asked Holmes to identify himself and three seconds later the crash occurred. (Ex. 34; Joint App. 967; III 589). Hughes, who was the Petitioner's own witness, testified that the plane's altitude never appeared on his radar screen and that he never had an opportunity to observe or

monitor the plane's altitude. That testimony was undisputed. (III 715-716). There was no evidence that the plane's altitude or that it was flying toward the mountain ever appeared on the radar screen or that Hughes could have learned in that 34-second period that the plane was flying at a low altitude toward the mountain.

There is no message in the Court of Appeals' decision opposite to a "safety first" policy with regard to the FAA's regulation of aviation as incorrectly asserted on page 10 of the petition. There is nothing in the decision that places FAA air traffic controllers beyond responsibility for accidents by VFR pilots within their sector. The Court of Appeals did not strike down an incentive for air safety. The Court of Appeals' decision promotes safety because it put the responsibility for the death of Kirk P. Cappello on Petitioner's pilot Holmes where it belongs.

The Court of Appeals' conclusion does not contradict policy concerns underlying congressional regulations or the regulations of the Air Traffic Control Manual. The decision does not contradict legislation and administrative regulation of air traffic. It does not promote bad policy and is not wrong. The Court of Appeals' decision is in accordance with applicable legislation and regulation pertaining to air traffic and is correct and follows the applicable laws and regulations as applied to the facts in this case based on undisputed evidence.

A. The Court's decision does not contradict congressional policy under the Federal Aviation Act of 1958.

The Court of Appeals did not say that a controller may disregard the safety of VFR aircraft in their sector and the Court did not condone FAA decisions to put safety second as incorrectly asserted on page 12 of the petition. It would have

made no difference if Hughes had watched the radar screen for the entire 34 second after Holmes asked for clearance since there was never anything on the screen to indicate that the plane was in danger or that it was approaching a mountain.

B. This case does not involve a question of law which is unsettled.

In re Greenwood Air Crash, 924 F. Supp. 1518 (S.D. Ind. 1995), cited by Petitioner is not in conflict with the decision in the instant case. In *Greenwood*, the planes that collided appeared on the FAA radar screen and the court pointed out that since the controller could see both planes on his radar scope, he had a duty to issue a warning to prevent the collision. In the instant case, it was established by undisputed evidence of Petitioner's own witnesses that the position and altitude of the plane never appeared on the controller's radar screen and that the plane was never under the direction or control of the FAA controller. (III 715-716; Opinion, Petitioner's Appendix, p. 2). Since the mountain was in plain view, Holmes was in a position to see it by looking in the direction the plane was headed. Therefore, the danger that was obvious to the pilot was not "equally obvious" to the controller as in *Todd v. United States*, 384 F. Supp. 1284 (M.D. Fla.).

Since the Court of Appeals did not make any ruling that absolves air traffic controllers from their duties imposed by statutes and regulations to issue warnings to pilots, there is no conflict between the decision of the Court of Appeals and the decisions in the other cases cited by Petitioner on pages 13 and 14.

C. The Court of Appeals' decision in this case is correct.

The Court of Appeals' holding that Hughes was not

negligent was not based on the conception that Holmes' duties absolved Hughes from any responsibility as incorrectly asserted on page 15 of the petition. The petition correctly states that the Air Traffic Control Manual requires controllers to issue a safety alert to an aircraft if they are aware that the aircraft is within unsafe proximity to terrain. The petition fails to mention that in the instant case it was established by undisputed evidence that the controller Hughes was never aware that the plane was within unsafe proximity to terrain or that it was flying at a low altitude toward a low mountain.

Hughes was required by Section 5-50 of the FAA Air Traffic Control handbook, 7110.65 to "establish and maintain radar identification of the aircraft" before he was to "provide radar service". (Ex. 93; VI 1385). To do that, Hughes was required to refile Holmes' flight plan into the computer (which Holmes' negligence caused to be "clocked out") and then obtain a radar beacon code assignment to facilitate proper identification of the plane. (Ex. 97; VI 1395). This is what Hughes was in the process of doing. The process was never completed for Holmes to be under Hughes' "control" because the crash occurred. (VI 1388, 1395).

The Court of Appeals' opinion did not view as mutually exclusive the federal regulations that govern the responsibilities of pilots and the regulations that govern the duties of air traffic controllers as incorrectly asserted on page 17 of the petition. The undisputed evidence established that controller Hughes was not guilty of any violation of any regulation or of any act of negligence. The statement on page 18 of the petition that the Court of Appeals concluded that "when a pilot is negligent an air traffic controller cannot be negligent as a matter of law" is not correct. The Court of Appeals never expressed or arrived at that conclusion.

The statement on page 19 of the petition that Hughes "turned his back to the radar screen for at least two minutes in order to perform a secondary task solely for his own convenience" is not supported by any evidence and is directly contrary to the undisputed evidence in the record. As pointed out by the Court of Appeals, there were only 45 seconds between the time Holmes first contacted Hughes and the time the plane crashed and there were only 34 seconds from the time Holmes first asked for clearance until the crash. (Opinion, Petitioner's Appendix, p. 18). Hughes had no reason to believe that the plane was in danger because Holmes never told Hughes of the plane's direction and altitude and they never appeared in the radar screen.

The statement on page 20 of the petition that if Hughes had fulfilled his priority duty, he would have issued a clearance immediately and the aircraft would never have been in danger is incorrect and contrary to the undisputed evidence in the record. There was no evidence that Hughes knew the plane was in danger or that Hughes could have known that the plane was not at a higher altitude than the mountain. (III 715-716, 746-748). Holmes did not need any clearance to fly above the mountain that was only 3,566 feet high. He could have flown to an altitude of 18,000 feet without any clearance. (Ex. 42A, 70). As pointed out by the Court of Appeals, "The pilot could have flown the plane straight up to 18,000 VFR without a clearance." (Opinion, Petitioner's Appendix, p. 21).

The assertion on page 20 of the petition that the Court of Appeals "reasoned that since Hughes was not looking at the radar screen, he had no duty to issue an alert" and that if he had looked at the screen Hughes "would have seen the potential danger to the aircraft" is incorrect and directly contrary to the undisputed evidence that there was never anything on the radar screen that would have indicated to Hughes that the plane was in danger. The Court of Appeals found:

> The aircraft, as defendant admitted, was not under Hughes' control. In addition, Hughes did not know that the plane was in danger and had no reason to assume that it was. Thus, there is no basis to assert that he should have issued a safety alert in this case.

(Opinion, Petitioner's Appendix, p. 21).

Petitioner's president, Mr. Duncan, testified that Holmes was flying VFR at all times which means "looking out the window, that's visual, that's right" and that required the pilot to look ahead to avoid hitting obstructions or terrain. (III 590-591).

Redhead v. United States, 686 F.2d 178 (3d Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983), is directly in point. In that case in which the controller actually had radar contact with the plane and monitored it, the court held at 686 F.2d 183:

> The controller had a right to assume that, in the absence of evidence to the contrary, conditions there were such that the aircraft could operate under visual flight rules.
>
> * * *
>
> The controller was in no better position to inform the pilot about the weather than the pilot was himself. It is not negligence not to repeat information already given or that is already known to the pilot. *Spaulding v. United States*, 455 F.2d at 227.

D. Even if there had been evidence that Hughes was negligent, the defense of comparative fault of Hughes should not have been submitted to the jury.

On the appeal to the Court of Appeals, Respondents contended that the defense of comparative fault of Hughes should not have been submitted to the jury because Petitioner never raised the affirmative defense that Hughes was guilty of comparative fault in an answer or pretrial order as required by F.R.C.P. 8(c) and T.R.C.P. 8.03 and because on May 4, 1992, when the Tennessee Supreme Court adopted comparative fault as a new defense in *McIntyre v. Ballentine,* 833 S.W.2d 52 (Tenn. 1992), the Tennessee one-year statute of limitation T.C.A. § 28-3-104(a)(1) had barred any claims Respondents had against Hughes and to allow Petitioner to benefit from the comparative fault of Hughes violates the Respondents' rights to due process under the Tennessee Constitution and the United States Constitution. Respondents cited *Owens v. Truckstops of America*, 915 S.W.2d 420 (1996), in support of that position. In regard to that contention, the Court of Appeals stated:

> Plaintiffs have called this Court's attention to the Tennessee Supreme Court's recent decision in Owens v. Truckstops of America. They have argued that, under Owens, a defendant tortfeasor cannot raise the defense of comparative fault of other tortfeasors who were non-parties if the plaintiff's claims against those other tortfeasors are barred by the statute of limitations. Thus, they assert, the verdicts against Kessock and Hughes must be set aside. While the Plaintiffs interpretation of Owens, if true, might provide an alternate rationale for the result reached here, we need

> not reach the issue. In light of this court's decision in this case, the question raised by the Owens opinion need not be decided.

(Opinion, Petitioner's Appendix, p. 22, footnote 17).

Therefore, if certiorari is granted, it would be necessary for the Court to determine whether under Tennessee law the district court erred in submitting to the jury the issue of comparative fault of Hughes when comparative fault was not pled as a defense by Petitioner and prior to the time comparative fault was adopted as a new defense under Tennessee law, the statute of limitations had barred any claim Respondents had against Hughes. The Tennessee Supreme Court in *Owens v. Truckstops of America, et al.* has decided that question as a matter of Tennessee law in favor of Respondents' contention and held that a defendant tortfeasor cannot raise the defense of comparative fault of other tortfeasors who were non-parties if the plaintiff's claims against those other tortfeasors are barred by the statute of limitations.

CONCLUSION

There is no compelling reason for granting certiorari in this case. The decision of the Court of Appeals is not in conflict with the decision of another United States Court of Appeals on the same matter. The Court of Appeals has not departed from the accepted and usual course of judicial proceeding. The error asserted by Petitioner consists of factual findings which Petitioner claims were erroneous but those factual findings are supported by undisputed evidence and admissions of Petitioner. The petition for writ of certiorari should be denied as in the similar case of *Redhead v. United States*, 686 F.2d 178 (3d Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983).

Respectfully submitted,

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